In The

Supreme Court of the United States

October Term 1979

No. 78-6276

VINCENT VIDAL,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Brief In Opposition to a Petition For A Writ of Certiorari To The Supreme Court of the State of New York, Appellate Division, Second Department.

Eugene Gold
District Attorney
210 Joralemon St.
Brooklyn, N.Y. 11201
(212) 834-5000

Laurie S. Hershey
Assistant District Attorney
of Counsel

Eugene Gold
DISTRICT ATTORNEY KINGS COUNTY
400 MUNICIPAL BUILDING
BROOKLYN, NEW YORK 11201
(212) 834-5000

I N D E X

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STATEMENT AND SYNOPSIS OF PREVIOUS PROCEEDINGS.

Petitioner is seeking a Writ of Certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated February 21, 1978 affirming with modification a judgment of conviction of the Supreme Court of the State of New York, Kings County, and an order of the Appellate Division, Second Department denying petitioner's motion to reargue his appeal.

Petitioner was convicted after jury trial of Criminal Sale of a Controlled Substance in the First Degree and related narcotics offenses and sentenced to a term of fifteen (15) years to life imprisonment (Honorable Justice Robert S. Kriendler presiding). Petitioner was denied leave to appeal the decision of the Appellate Division, Second Department to the Court of Appeals of the State of New York by Honorable Jacob D. Fuchsberg, Associate Judge of that Court on November 27, 1978.

JURISDICTION

The jurisdiction of this court is invoked under 28 United States Code section 1257(3). (petition p.3).

The petitioner raises fourteen points involving essentially the adequacy of the appellate review afforded him; a claim of subornation of perjury by the prosecutor, the legality of his arrest and the ensuing search and seizure, and the conduct of the presiding judge and prosecutor at trial.

STATEMENT OF FACTS

By Kings County Indictment Number 7824/1973 petitioner, Rosario Barbarino and one other were charged with Criminal Sale of a Controlled Substance in the First Degree and related counts. These charges involved the sale of cocaine, in one instance in excess of one ounce, to an undercover police officer on November 8, 1973 and on November 20, 1973. Petitioner and Barbarino were also charged with narcotics offenses under Indictment 7826/ 1973.

The subject of petitioner's appeal to the Appellate Division, Second Department was the aforementioned conviction obtained against him following one trial of consolidated indictments 7824/73 and 7826/73 wherein he was the sole defendant on trial.

Suppression Hearing

On December 27, 1973, at approximately 3:00 p.m., POLICE OFFICER GEORGE MURPHY was informed by undercover Officer Angelo Florio that Florio had just purchased a quantity of cocaine at 679 48th Street, apt. 3E. (H. 3,4).* Within five minutes of this conversation, Murphy and fellow officers entered the building and approached apt. 3E. (H. 6,7). They obwerved a man in the doorway and the door being closed behind him from a person within. (H.7) They

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* Numbers preceded by "H" refer to minutes of the suppression hearing dated November 4, 1977.

pounded on the door, identifying themselves as officers and demanding entry. (H. 63) The door was opened and the officers entered, some with guns drawn. (H. 9,65,67). Petitioner was immediately arrested, handcuffed and placed on his stomach in the kitchen. (H. 10-12). A revolver and a small bottle containing a white powder with a spoon attached were subsequently recovered from petitioner's person. (H. 10,114).

The officers checked the rest of the apartment to see if anyone else was present. (H. 241). Officer Murphy then noticed through a clear glass door of a kitchen cabinet a clear plastic bag containing white powder, a quantity of tin foil packages, a small bottle containing white powder, and clear bags in another bag containing vegetable matter. (H. 25) U.S. currency was also seen in the kitchen and bedroom and was seized at that point. (H. 140, 141). Other officers observed other items in the apartment at that time. (H. 73)

Officer Murphy remained in the apartment for approximately two hours guarding petitioner and his cohort and awaiting the return of and further instructions from his seargent. (H. 15, 16). At approximately 5:30 p.m., the seargent returned and ordered Murphy to seek a search warrant. (H. 26).

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* Numbers preceded by "H" refer to minutes of the suppression hearing dated November 4, 1977.

Other than the U.S. Currency and the objects seized from petitioner's person, all items taken from the apartment were seized pursuant to a subsequently obtained search warrant signed by New York Criminal Court Justice Norman J. Feelog. (H. 27, 48). (Search Warrant and affidavit attached hereto as appendix).

Stating its findings of fact and conclusions, of law, the court denied the motions to suppress and to controvert the search warrant. (H. 284-291).

The Trial

On November 8, 1973, UNDERCOVER POLICE OFFICER ANGELO FLORIO met with Rosario Barbarino.* They entered a tan 1968 Buick Riviera in the vicinity of 60th Street and 3rd Avenue (9-14).** After the conversation, the driver of the car, produced a tin foil packet. (22, 23). [The powder contained therein was established through subsequent witnesses to contain cocaine.(2725, 2897)]. Barbarino sniffed the powder inside the packet.

Florio thereupon handed $100 to the passenger next to petitioner, who passed the money to petitioner, (23, 24). A conversation ensued about prospective buys of cocaine in which peti-

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* Rosario Barbarino, originally indicted with petitioner, testified for the People at trial in return for a prospective plea to a lesser charge. He ultimately pleaded guilty to an A III Felony and received life-time probation.

** Numbers in parenthesis refer to trial minutes dated November 12, 1974.

titioner quoted the price of $1000 per ounce (26). Florio and Barbarino departed each with a tin foil packet of white powder. (26).

On November 20, 1973, after conversing with Rosario Barbarino, undercover Officer Angelo Florio again met with him at 1965 69th Street, apt. 1A (34, 35). Petitioner entered this apartment and produced clear plastic bags containing white powder. (37) [Powder was established to be one and three-quarter ounces of cocaine through subsequent witnesses, (3143)]. In exchange for the bags, Florio gave petitioner $2000. (38).

In the first or second week of December, 1973, Officer Florio had a phone conversation with Barbarino wherein Florio expressed his desire not to do further business with petitioner because of the poor quality of the cocaine supplied. Barbarino stated that he had other sources. (57, 58, 61, 62). Further phone conversations were had between Florio and Barbarino on December 26th and December 27th during which the phone was tapped. (63, 76). They arranged for Florio to purchase 1/2 kilo (18 ounces) of cocaine for $18,500 on December 27th at 48th Street between 7 and 8th Avenues,..."The guy's house." (67, 69).

On December 27th, Florio equipped himself with a Nigra recording device and a Kel transmitter device and also equipped his vehicle with recording devices. (70, 82, 83, 85). He picked up Barbarino at a designated location and they proceeded to 679 48th Street, Apartment 3E. (88). On the corner of 48th Street and 7th

avenue, Florio noticed the same tan Buick with the same license plate that he had entered on November 8, 1973. (647).* He had ascertained that the plate was registered in petitioner's name. (646). He had also learned through further investigation that petitioner resided at the apartment he was about to enter (647, 2509).

Upon entering the apartment, Barbarino went into the bedroom and exited with a clear bag containing white powder. (92). Florio had observed a figure wearing what appeared to be lady's a robe step into the bedroom (89).

Florio examined the clear bag and returned it to Barbarino. (93). He then obserbed Barbarino walk back to the bedroom, and saw a sleeved arm reach from the bedroom and take the bag. (93). Florio exited the apartment to get the money he had left in the car. P.O. Kennedy, posing as the "person riding shotgun" to protect Florio' money, had guarded the car containing $18,200 while Florio was in the apartment. (652, 653, 656).

Upon re-entering the apartment with money, Florio again observed Barbarino approach the bedroom. From a distance of from 8 to 12 feet, he saw the same yellow sleeved arm protrude from the bedroom and hand Barbarino the clear bag. (96, 544, 564). Barbarino handed some of the $18,200 to the hand and said, "Here Vin." (p. 97). Florio gave $300 to Barbarino in exchange for

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* Numbers of trial transcript beginning with p. 501 refer to transcript of November 18, 1974.

the clear bag and exited the apartment leaving the rest of the $18,500 in the apartment (97).

Florio immediately met with his back-up team and within five mintues they returned to 679 48th Street. (935). They gained access to the building by commanding an occupant to unlock the front door. (572). At the time they had guns and shields displayed.(572). Upon approaching the 3rd floor landing, Florio obseved petitioner in the doorway of 3E, holding the door opened and conversing with another man. .(935). Florio stated, "Police", petitioner pushed the other man out and slammed the door closed (936). Florio kicked the door several times, announcing "Police, open the door." (937). The door was opened and the officers entered. (937). Florio observed the stack of bills on the kitchen table. (938). He remained a short time in apartment 3E. (1093).

Tapes of the phone conversations of December 26th and December 27th and the tape from the Nigra wired to Florio inside apartment 3E were played for the jury. Florio's testimony that he heard Barbarino state "here Vin" when Barbarino handed the money to the person in the bedroom was corroborated by the tape. (625).

ROSARIO BARBARINO testified that in return for his testimony he was promised a prospective sentence of eight (3) years to life imprisonment. (743).* In testifying about the November 8th, November 20th, and December 27th transactions, Barbarino corroborated Angelo

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* Numbers now refer to trial transcript dated Nov. 19, 1974, a.m. session.

Florio's testimony in many material respects. He further related his phone conversation with petitioner concerning the December 27th transaction wherein it was agreed that petitioner would remain in a separate room from Florio because of Florio's expressed dissatisfaction with petitioner as a supplier. (793).

Concerning the December 27th transaction itself Barbarino testified that petitioner remained in the bedroom and was wearing a multi-colored housecoat over dungarees. (798). The exchange of cocaine and money proceeded as Officer Florio had testified to (802-807). After the "buy" was consummated and Florio left the apartment, petitioner exited the bedroom and was no longer wearing the housecoat. (811). Barbarino could not remember whether he had been wearing the housecoat the second time Barbarino went to the bedroom. (925).

Petitioner and Barbarino were counting the money when they heard banging on the door and "open up, open up." (812). Petitioner was standing in the hallyway outside the kitchen with a gun pointed towards the door. (812, 8134, 819). Barbarino opened the door and was pushed and concealed behind it as the police entered. (814, 951, 952). At this point, he was not able to see petitioner or the position of his gun. (951). As the police proceeded into the apartment he fled with $2,150 through the front door, to the roof and out the fire escapt. (814, 817).

OFFICER PAUL DELUCIA, SARGEANT WILLIAM ALLEE and SARGEANT

JOSEPH TOAL testified to their activities as members of Officer Florio's back-up team. (1957-2448). Sargeant Toal stated that after leaving petitioner's apartment on Dec. 27th following the entry and arrest by the back-up team, he and officer Florio met with another officer on 65th Street and then went to Barbarino's home. (2177). They thereafter proceeded to the 62nd precinct to seal and sign the evidence (2178). Following that procedure, they went again to Barbarino's home and then returned to petitioner's apartment at approximately 10 p.m. (2186, 2187). At that point Officer Murphy had obtained a search warrant, but no search, other than for occupants, had been executed. (2187, 2188). Sargeant Toal directed Murphy to execute the warrant (2189).

ARGUMENT

REASONS FOR DENYING THE PETITION

POINT I

PETITIONER CANNOT SUBSTANTIATE A CLAIM OF DENIAL OF HIS RIGHT TO EFFECTIVE APPELLATE REVIEW.

Petitioner claims that he was denied his right to full and effective appellate review by the Appellate Division, Second Department on the grounds that a substantial portion of the trial transcript was never before that court. However, petitioner can point to no record on the basis of which he can substantiate this contention.

The lack of any record to support petitioner's claim indicates the impropriety of the assertion of that claim before this Court in a petition for a Writ of Certiorari. Ciucci v. State of Illinois, 356 U.S. 571 (1958), petition denied 357 U.S. 924 (1958); Villa v. Van Schaick, 299 U.S. 152 (1936). It further indicates that, at least at this juncture, the claim is without even colorable merit since no evidence has anywhere been adduced rebutting the presumption of regularity of judicial proceedings. Wigmore on Evidence, [9th Ed.], section 2534; State v. Burke, 253 Wis. 240, 33 NW2d 242 (1948); State v. Boles, 150 W.Va. 1, 146 S.E.2d 585 (1965); State v. Andrews, 282 Minn. 386, 165 N.W.2d 528 (1969).

Moreover, casting substantial doubt over the merits of petitioner's claim is the fact that the Appellate Division, Second Department denied his motion to reargue the appeal on the grounds

that an incomplete transcript had initially been submitted to the court. Honorable Judge Fuchsberg of the Court of Appeals also denied leave to appeal in spite of two lengthy letters to him by petitioner's counsel asserting the claim of an incomplete record on appeal before the Appellate Division, Second Department. It would thus appear that there indeed must have been a complete record on appeal before that court.

In short, petitioner's claim, the validity of which is seriously called into question by the above actions of the Appellate Division, Second Department and the Court of Appeals, is inappropriately before this Court as there is no record upon which this Court can determine its merits.*

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* While respondent does not concede that there is any merit to petitioner's claim, we note that his appropriate remedy would appear to be a post-judgment motion pursuant to New York Criminal Procedure Law Article 440 by which petitioner can attempt to adduce testimony on the record to substantiate his claim.

POINT II

PETITIONER'S ALLEGATIONS THAT THE PROSECUTOR SUBORNED PERJURY AND MISREPRESENTED FACTS TO THE COURT AND DEFENSE COUNSEL ARE UNSUPPORTED AND NEGATED BY THE RECORD.

Petitioner contends that the prosecutor "elicited false and perjured testimony from Rosario Barbarino" and lied to the court and counsel about Barbarino's status as an informant and as a prospective People's witness. More specifically, petitioner alleges that the trial assistant knew at the time of direct examination of Barbarino that Barbarino was promised and would receive a sentence of life-time probation, but nevertheless falsely led the jury and defense counsel to believe that the witness was promised eight years to life imprisonment. To support this contention, petitioner relies entirely upon a deposition of Henry M. Gargano, attorney for Rosario Barbarino, dated August 4, 1977 and the sentence recommendation of Assistant District Attorney Arnold Taub dated January 27, 1975.

Petitioner can place no reliance upon Gargano's deposition to support his argument because it is extraneous to the record on appeal. The sentence recommendation of Mr. Taub requesting that the court sentence Barbarino to life-time probation in no manner supports petitioner's argument. Nothing in this letter in any way indicates that Barbarino or his lawyer were ever promised a recommendation of life-time probation by the District Attorney's office, or if there ever were such a promise, at what point in time it was made.

Based upon these two documents counsel for petitioner now urges this Court to conclude that the trial assistant suborned perjury in the manner heretofore stated. It is clear that petitioner has no support for such allegation. Moreover, the trial testimony of Henry Gargano undermines petitioner's claim. In redirect examination of Gargano, who was called by the defense as a witness at trial, petitioner's counsel elicited the following in an improper attempt to impeach his own witness:

Mr. Sutton:

Q: Mr. Gargano, it is not a fact that at the present time you still are in the process of making arrangements for disposition as to cases against Mr. Barbarino with the District Attorney?

Mr. Gargano:

A. That's correct.

This passage would tend to indicate that no promise of lifetime probation had been made by the District Attorney's Office at the time Barbarino testified at trial.

Petitioner's second allegation that the trial assistant lied to the court and to defense counsel about Barbarino's status on the eve of trial is equally without any support in the record. There is no indication that the trial assistant ever misrepresented anything to the court or to defense counsel concerning Barbarino's status as an informant, or concerning his decision to turn state's evidence <u>following</u> the motion to consolidate and at

some point during the suppression hearing. The prosecutor never stated to the court that Barbarino, "first became an informant the day of the suppression hearing." (petition p. 23; nowhere in the record.)

In short, petitioner's allegations are simply concocted out of thin air. All the cases cited by petitioner involving intentional or negligent use of false and perjured testimony by a prosecutor are inapposite in that no false or perjured testimony can be shown to have been used in the case at bar, either intentionally or negligently.

POINT III

THE COURT CORRECTLY DENIED THE MOTION TO SUPPRESS EVIDENCE AND TO CONTROVERT THE SEARCH WARRANT. (Answering Petitioner's Points III through IX).

A. The Warrantless Arrest of Petitioner Was Based Upon Probable Cause and Was Executed in a Lawful Manner.

Petitioner contends at the outset that the warrantless arrest was unlawful since..."None of the police officers had any knowledge as to who was in the apartment." (p. 27 of the petition). According to petitioner the police lacked probable cause to arrest Barbarino since..."They knew Barbarino was not in the building", and it is irrelevant whether they had probable cause to arrest petitioner since it was not specifically stated at the suppression hearing by Officer Murphy that such was the purpose of their entry. (27-29 of petition.) (At the hearing, P.O. Murphy testified that the team entered apt. 3E..."to arrest Barbarino and any other occupant.")

We submit that the evidence unequivocally establishes the existence of probable cause to justify a warrantless entry into petitioner's apartment and his subsequent warrantless arrest. The legality of the arrest is governed by New York Criminal Procedure Law section 140.10 (1) (b), which provides that "a police officer may arrest a person for....[a] crime when he has reasonable cause to believe that such person has committed such crime..." Clearly

reasonable cause existed in the case at bar. Only 5 minutes prior to the entry, Florio had been in an apartment which he knew to be rented by one Vincent Vidal, petitioner. (2509, and warrant affidavit). Inside that apartment he had just purchased 1/2 kilo of cocaine from Barbarino and another faceless individual in the bedroom referred to as "Vin", or "Vinnie" (corroborated by tape, p. 625). On two occasions within a prior six week period Florio had purchased cocaine from Barbarino and petitioner whom the officers knew by name as early as November 9th. (H. p. 77). Hence, when viewed in the over-all context of the testimony, the one isolated statement of Murphy, cited by petitioner is meaningless. It was unequivocally demonstrated to the hearing court that the officers knew whose apartment they were about to enter and whom they were about to arrest.

An arresting officer need only have a reasonable belief that the suspect is present within the target premises. CPL sections 140. 15 (4), 120,80; People v. Fitzpatrick, 32 N.Y.2d 499, 509 (1973); People v. Ernest E., 38 A.D.2d 394 (2d Dept. 1971); app. dism 30 N.Y.2d 884 (1972); United States ex rel cantanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1970); United States v. Hoflman, 488 F. 2d 287 (5th Cir. 1974). There can be no serious doubt that Florio and his team had reasonable cause to believe that peitioner was the "Vinnie" in the bedroom of his own apartment. CF. People v. Horowitz, 21 N.Y.2d 55

(1967); People v. Martin, 48 A.D.2d 213 (4th Dept. 1975); People v. Bolar, 49 A.D.2d 867 (1st Dept. 1975).

The arrest, furtheremore, was executed in a lawful manner. Criminal Procedure Law Section 140.15(4) provides that to effect a warrantless arrest "a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized...." in an arrest pursuant to a warrant. In making such an arrest section 120.80(4) provides that an officer need not give notice prior to entry if "there is reasonable cause to believe that the giving of such notice will: (a) Result in the defendant escaping or attempting to escape; or (b) Endanger the life or safety of the officer...; or (c) Result in the destruction, damaging or secretion or material evidence."

In arguing that the arrest was unlawful since the officers displayed their guns and shields in gaining entry to the building and the apartment,petitioner ignores these statutory provisions and the case law on "exigent circumstances" which they codify. See People v. Floyd, 26 N.Y.2d 558 (1970); Ker v. California, 374 U.S. 23, 38-39 (1963); People v. Delago, 16 N.Y.2d 289 (1965). Clearly, the arresting officers were justifiably concerned that if given the opportunity petitioner might attempt to escape and/or to secrete or destroy potential evidence on his person or in the apartment. This concern could have only been heightened when, upon

approaching the apartment itself, the officer observed petitioner hurriedly slam the door, leaving his cohort in the hallway. (H. 7). Moreover, the easily destructible nature of narcotics in and of itself justified the manner of the police entry into the building and into the apartment. People v. Delago, supra; People v. Galleges, (80 Misc. 2d 265). (Sup. Ct. Kings Co. 1975).

Having lawfully arrested petitioner, the officers were entitled to incidentally search his person and to seize the weapon and bottle of white powder discovered thereon. United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969); People v. Malinsky, 15 N.Y.2d 86, 91 (1965); People v. Santiago, 13 N.Y.2d 326, 331 (1964). Moreover, we contend that all items seen by the officers in plain view while they were searching petitioner, and appearing to their experienced eye to be contraband, could have been seized at that point without the search warrant. (i.e. narcotics and narcotics paraphenalia observed through glass kitchen cabinet when petitioner was searched.) Coolidge v. New Hamshire, 403 U.S. 443, 465-467 (1971); Chimel v. California, 395 U.S. 752, 763 (1969); People v. Fitzpatrick, 32 N.Y.2d 499 (1973).*

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* See footnote, #24, p. 465 of Coolidge, supra, wherein this Court interpreting Chimel, supra, notes that evidence may be seized, although outside the immediate control of the arrestee, so long as plain view is obtained in the course of an appropriately limited search of the arrestee. See also Fitzparick, supra, wherein Court of Appeals approved the search of an entire room or area in which a defendant had been and to which he had full access.

B. The Search Warrant Was Issued Upon a Showing of Probable Cause And Was Valid In Every Respect.

It should be noted at this juncture that there is no indication in the record, contrary to petitioner's assertion, that an improper search of the apartment was conducted prior to the obtaining of a warrant. The officer testifying at the hearing stated consistently that an immediate sweep of the apartment was conducted to determine whether other persons were present therein. (H. 241). As the officer testified, as the record attests to, and as the Court adopted in its findings of fact, no search for contraband was conducted at that time. (H. 285, 286) [e.g. Petitioner's contention that the police opened the top drawers of a table in the bedroom prior to obtaining the warrant has no basis in the record. (p. 240 of the hearing which petitioner cites to support this claim in no manner does.)].

Hence petitioner's "fruit of the poisonous tree" argument, that the affidavit requesting the warrant was founded upon information obtained from an illegal search, must fail.

The affidavit clearly established probable cause for a full-scale search of petitioner's apartment. In the first place, the information in the affidavit was based upon the affiant's personal observations, and upon his fellow officer's first-hand transaction with petitioner, corroborated in part by the affiant's observations. Hence there was a reliable basis upon which the issuing magistrate

could credit the information. United States v. Ventresca, 380 U.S. 102, 111 (1965).

This information coupled with the November 8th and November 20th transactions furnished an ample basis for the magistrate to conclude that petitioner was involved in protracted and continuing large-scale narcotics operations, and that narcotics were presently inside his apartment. United States v. Harris, 482 F.2d 115, 1119 (3rd Cir. 1973); Cf. People v. Wright, 37 N.Y.2d 88, 91 (1975).

To conclude, the arrest of petitioner was lawful and the search warrant was properly issued upon a showing of probable cause.

POINT IV

PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE CONDUCT OF THE TRIAL JUDGE OR THE PROSECUTOR.

The conduct of the trial judge we submit, was fair and proper throughout petitioner's trial. What petitioner characterizes as "counseling the prosecution", we submit was simply explanations to the prosecutor of the basis for conditional rulings denying offers of items into evidence. These explanations involved technical problems such as the point at which vouchered packages of narcotics and their contents were sufficiently identified (i.e., linked to petitioner) as to permit testimony concerning them and, their formal admission into evidence.(842, 843, 855, 876-878, 940, 941).

The narcotics evidence against petitioner was clearly admissible, having been scrupulously sealed, signed, vouchered and identified by the undercover officer and by various members of his back-up team immediately following the sales to the undercover officer. Moreover, the People presented four chemists who provided uncontroverted expert testimony as to the presence of cocaine in the substances offered into evidence. (2823-5, 2897, 2976-2984, 2992, 3191).* It can hardly be concluded that petitioner was

* The issue of the admissibility of the narcotics into evidence was extensively litigated in the appeal to the Appellate division, specifically regarding the questions of chain of custody and sufficient scientific testimony to support the expert conclusions that the substances were in fact narcotics.

denied a fair trial because of the trial judge's strict requirements, as communicated at times to the prosecutor, concerning the chronology of testimony he deemed necessary in order to establish identity and chain of custody of evidence prerequisite to its admission. Indeed, the judge sought only to protect petitioner's rights in this respect.

Nor was the court's questioning of witnesses violative of petitioner's rights. It is fundamental that a trial judge is entitled, indeed obligated to intervene in the questioning of witnesses when clarification of material issues appears to be necessary.* United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. den. 411 U.S. 918 (1973). This the court did, and no more. [e.g. at 2897 where after exhaustive cross-examination by petitioner's counsel of the expert witnesses for the People, during which counsel virtually testified as an unsworn witness to his purported personal scientific expertise in chemical analysis, (2866, 2868, 2869, 2872, 2719, 2720, 2747, 2748, 2756, 2787, the

* It should be noted in this connection that throughout petitioner's trial, the judge found it necessary to repeatedly admonish his counsel about constantly "characterizing witnesses' answers", constantly interrupting and "baiting" the judge, and in general doing everything in his power to create chaos in the courtroom and cause commission of reversible error. (i.e. the trial is replete with instances of disruption of questioning of witnesses through repeated objections by defense counsel, just previously over-ruled, to the point where coherent testimony was rendered impossible.) Petitioner's counsel was ultimately ruled in contempt of court and sentenced to a fine of $100. (H. 248, H. 299, H. 305, H. 306, H. 307, H. 321, H. 322, 117, 118, 121, 752, 2007, 2017).

court asked the chemist Acevedo whether there was any question or doubt about his conclusion as to the presence of cocaine in the substance analyzed.].

Nor did the trial judge deny petitioner a fair trial in his charge to the jury which included all the standard instructions for the benefit of petitioner, including but not limited to the equal status of a police officer to that of any other witness (212), the right of petitioner not to testify (213), the requirement that accomplice testimony be corroborated (216-218), the People's burden of proof beyond a reasonable doubt (220-222), the non-evidentiary value of an indictment (222), the presumption of innocence (220), and the right of the jury to reject expert opinion testimony (238).

Petitioner's contention that the court"directed findings of fact" particularly with respect to the expert testimony is negated by the record. The court charged the jury:

> "Now, when a case involves a matter of science requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the aid of the court and the jury. The judge must decide whether or not a witness is an expert. But it is up to the jury to decide what credibility and what weight you will give to each chemist's testimony. In this case the Court found as a matter of law that each of the chemists was an expert in his field of chemistry and drug analysis. The opinion

> stated by these experts from the witness stand was based on the particular facts as the expert himself observed them and recorded them. You may reject an expert's opinion if you find the facts to be different from those which form the basis of his opinion, or you may reject his opinion if after careful consideration of all the evidence in the case, expert or otherwise, you disagree with his opinion.
>
> In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances established by other testimony. For example, if you learn that a chemist was bribed to make a false report. If you found that there is a substantial question as to whether the chemist analysed the right substance, you would be justified in rejecting his opinion. An expert's opinion is subject to the same rules regarding credibility as the testimony of any other witness. His testimony is entitled to such weight as you find the expert's qualifications in his field warrant. And while it must be considered by you it is not controlling on your judgment. (237-239). (emphasis added)

Nor did the prosecutor deny petitioner a fair trial. Petitioner complains of the prosecutor's remark in summation that if there was any doubt that the substances analysed contained cocaine, the defense could have produced their own chemist, and that the evidence in this respect was "unchallenged." (190, 205). [It is to be noted that the defense summation concentrated to a large extent on denigration of the expert testimony (174-185)]. However, any error in this comment was cured by the prompt instruction given by the judge that a defendant is under no obligation to produce any evidence or call any witnesses and that the people must prove guilt beyond a reasonable doubt. (190).

To conclude, petitioner was not denied a fair trial by either the trial judge or the procecutor.

POINT V

THE TRIAL TRANSCRIPT WAS NOT RENDERED INCOMPLETE BY FAILURE OF THE COURT STENOGRAPHER TO TRANSCRIBE THE TWO TAPES PLAYED FOR THE JURY. (Answering Petitioner's Point XIII).

At the outset, we dispute petitioner's contention that the telephone conversations between Barbarino and the undercover officer wherein narcotics dealings were discussed were "illegal hearsay" inadmissable against petitioner. These conversations were admissable against petitioner as declarations of a co-conspirator made during the course of and in furtherance of the conspiracy. People v. Rastelli, 37 N.Y.2d 240 (1975); People v. Liciano, 277 N.Y. 348, 358 (1928); People v. McKane, 143, N.Y. 455, 470 (1884); Richardson on Evidence, [10th Ed.], Prince, section 244, p.214.

Furthermore, petitioner's contention concerning the failure to stenographically transcribe the tapes is entirely specious. Insofar as the tapes were exhibits admitted into evidence, as such, they could have been made part of the record on appeal. Had petitioner truly wanted the Appellate Division, Second Department to hear the tapes, he had only to request that they be sent to that court along with the trial transcript. It is common practice for the Appellate Division to listen to tape recordings or to examine trial exhibits at the behest of appellate counsel.

Insofar as it was petitioner's responsibility to compile the record on appeal, it was his duty to include the tapes as

exhibits if he so desired. His failure to do this reveals his disinterest in having the Appellate Division review these recordings.

Petitioner's claim is obviously spurious.

POINT VI

THE COURT WAS JUSTIFIED IN SEALING THE COURTROOM DURING THE TESTIMONY OF THE UNDERCOVER OFFICER. (Answering Petitioner's Point XIV.

We submit that the court was justified in sealing the courtroom during the course of Officer Florio's testimony. While we recognize that a hearing should normally be held prior to a sealing order, we note that counsel below requested no such hearing, and that it has been held that while desirable, a hearing is not mandatory. People v. Jones, ____A.D.2d____, 405 NYS2d 461 (1st Dept. 1978), US ex rel Lloyd v. Vincent, 520 F.2d 1272, 1275 (1975).

In the instant case, the prosecutor represented to the court that the undercover officer was presently engaged in active investigations, and that sealing of the courtroom was necessary to protect the identity of confidential informants with whom he was working as well as his own identity. Such representations, we submit, justified the court's order, which was limited only to the testimony of the undercover officer. People v. Hinton, 31 N.Y.2d 71 (1972), cert. den. 410 U.S. 911 (1973); People v. Richenbacker, 50 A.D.2d 566 (2d Dept. 1975).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.

Dated: Brooklyn, New York
March, 1979

Respectfully submitted,

Eugene Gold
District Attorney
Kings County
210 Joralemon Street
Brooklyn, N.Y. 11201
(212) 834-5000

LAURIE S. HERSHEY
Assistant District Attorney
of Counsel

A P P E N D I X

Search Warrant
Sec. 787 C.C.P.

Criminal Court of the City of New York

Part ....., County of KINGS

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by

Police Office, George Murphy, shield #25787, 11th Narcotic Division, Brooklyn South Narcotic, New York Police Department

that there is probable cause for believing that certain property controlled substances and/or books and records pertaining to the sale or distribution of such controlled substances in violation of Article 220 of the Penal Law of New York.

You are therefore commanded, between 6:00 A.M. and 9:00 P.M. or any hour of the day or night.

to make an immediate search of 679 48th Street, Apartment 3-E., Borough of Brooklyn, County of Kings,; a multiple brick dwelling. Apartment 3-E is on the 3rd floor right hand rear.

occupied by Vincent Vidal, a known Narcotics violator.

and of the person of Controlled Substances as specified in Article 220: of the Penal Law of the State of New York.

and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered.

and if you find any such property or any part thereof to bring it before me at Part APAR 3 Criminal Court at ~~Supreme Court, Kings County~~ Adams Street 120 Schermerhorn Street, New York City.

Dated at New York City,
Dec. 27, 1973

Norman J. Felix
Judge

PG 1B

Search Warrant
Affidavit for
Sec. 787-a C.C.P.

Criminal Court of the City of New York

Part ....., County of KINGS

State of New York } ss.:
County of

P.O. GEORGE MURPHY, Shield #25787

being duly sworn, deposes and says:

1. I am Police Officer George Murphy shield #25789, the 11th Narcotics District, Brooklyn, South Narcotics.

2. I have information based upon my own knowledge and information given me by brother police officers and upon observations made by myself and brother officers. Among the information referred to are the following facts:

On November 8, 1973 at approximately 8:55 A.M. the defendant Vincent Vidal did sell approximately 1/8 ounce of Cocaine to an under cover police officer for $100.00 U.S. CURRENCY.

On November 20, 1973 at approximately 8:50 P.M. the defendant Vincent Vidal did sell approximately 2 ounces of Cocaine to an under cover police officer for $2000.00 U.S. currency.

On both of the above stated dates, November 8, 1973 and November 20, 1973 the defendant Vincent Vidal acted in concert with one Rosario Barberino, B#590117.

On December 27, 1973 at approximately 3:00 p.m. the undercover police officer did enter premises apartment 3-E 679 48th Street, Borough of Brooklyn, County of Kings. This apartment is listed in the records of the Brooklyn Union Gas Company as belonging to one Vincent Vidal. A further check of the Con Edison records show that they list this apartment as belonging to Vincent Vidal. In this apartment (3-E) at 3:00 p.m. on December 27, 1973, a person known to your deponent as Rosario Barberino Police Department identification number B#590117, did engage the undercover police officer in conversation concerning narcotics. Rosario Barberino at this time told the undercover police officer that the price of 1/2 kilo (approximately 18 ounces cocaine) would cost the undercover officer $18,500 in U.S. currency. [redacted] Rosario Barberino was then handed a clear plastic bag by a person outside the kitchen. The undercover police officer observed the contents of the bag and agreed to the purchase. At this time Rosario Barberino handed the bag to the person outside the kitchen, saying; "Here's the stuff Vinnie." The undercover police officer, accompanied by, Rosario then left apartment 3-E and went to the undercover police officer's vehicle.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property REFERRED IN THE AFFIDAVIT

[redacted]

at premises Apartment 3-E, 679 48th Street, Brooklyn

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of SAID PREMISES

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

George Murphy 25787 PO ND 11
Police Officer Shield Rank Command

Sworn to before me
12-27 1973

Norman J. Felix
Judge

PG 1B

They picked up the money that was to be used for the purchase of the Cocaine and returned to apartment 3-E, 679 48th Street. At this time, within the kitchen of apartment 3-E Rosario Barberino began counting the $18,500. Barberino then took a portion of this money to give to the person who was not in the kitchen. The undercover police officer took the above referred to package containing cocaine and left the apartment.

After having discussed this event with the undercover officer at approximately 3:20 p.m. on the same day (December 27, 1973), your deponent and brother officers approached this apartment 3-E, 679 48th Street, Brooklyn. Defendant Dennis Vitale, male white, approximately 19 years of age, approximately 210 lbs., approximately 6' 2", brown hair, full beard, was seen exiting apartment 3-E. Your deponent and brother officers then knocked on the door of the apartment 3-E and were granted entry by the above referred to Vincent Vidal who was at this time the sole occupant of this apartment. On the kitchen table inside this apartment was approximately $10,000 of the money which which the undercover police officer had used to make the purchase of the referred to 18 ounces of cocaine (the serial numbers of this money having been recorded previously). In the bedroom of the same apartment, in open view on the bed was an additional recorded sum of U.S. currency totaling approximately $6,000. From the person of Vincent Vidal, a loaded 38 calibre revolver, and approximately 1/8 of an ounce of cocaine, were seized. Your deponent also saw in the glass front kitchen cabinet in the kitchen a clear plastic bag containing a white powder(approximately 1/2 ounce) within a paper cup behind this glass front. Based upon my seven and a half years in the Police Department and approximately 1 year as a member of the Narcotics Division, I believe that the bag behind the glass front contains a controlled substance.

Defendants Vincent Vidal and Dennis Vitale have been placed under arrest and police officers have been placed within the apartment 3-E, 679 48th Street, Brooklyn. Your deponent therefore respectfully requests of this court that the court issue a search warrant directing a search for and seizure of the property (any and all controlled substances, dilutants, paraphernalia, records of the sale and distribution of said controlled substances, monetary proceeds of said sale and distribution of controlled substances and any further dangerous weapons)designated herein at the premises designated herein; and at any time of the day or night. Such search to begin immediately after this court sees fit to grant the requested warrant.

P.O. George Murphy
Shield #2573
D.C.C.